No. 17-1184

IN THE
Supreme Court of the United States

MICHAEL J. BIESTEK,
Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This Court granted certiorari to consider whether the testimony of a vocational expert, alone, can constitute substantial evidence of "other work" available to a social security disability benefits applicant when the expert refuses upon request to provide the data upon which her testimony is premised. The answer to that question is no. This Court's case law, both in the social security context and elsewhere, instructs that an expert's testimony must have evidentiary support and be subject to meaningful cross-examination to constitute "substantial evidence." When an expert testifies that a specific number of jobs exists, at a specific time, in a specific location, but then refuses to provide the data she concedes she relied upon in forming these conclusions, neither of this Court's basic requirements is met. Conclusory testimony paired with the refusal to provide data that allegedly form the basis for that testimony cannot constitute substantial evidence in support of an agency's determination.

The government spends little time addressing the actual question presented, *see* Gov't Br. 40–42, 44–46, and provides no persuasive explanation for how a vocational expert's unsupported testimony can constitute substantial evidence regarding dynamic job markets. *First*, the vocational expert's experience and the fact that Petitioner did not object to her qualifications, *see id.* at 40–41, 44–46, provide no evidentiary basis for the expert's data-driven testimony regarding the existence of specific jobs, in specific numbers, at specific times, in specific places. *Second*, that Petitioner's counsel could cross-examine the expert,

see id. at 48–49, does not transform a record lacking substantial evidence into one with a sufficient evidentiary basis. This is the case both because the agency bears the burden of demonstrating the existence of a significant number of jobs available to an applicant, and because a refusal to provide access to data upon which an expert's testimony is based deprives an applicant of the material necessary for an effective cross-examination. *Third*, an applicant's ability to "submit rebuttal evidence," *see id.* at 51, likewise cannot fulfill the agency's burden to provide substantial evidence of other work. *Id.* at 41. That is all the more so here where Petitioner's rebuttal expert "failed to discuss" the vocational expert's job numbers. *Id.* The government never explains how a deficiency in its own expert's testimony can be "indirectly support[ed]" by the testimony of another expert who never addresses the issue at all. *Id.*

The government devotes the majority of its brief not to addressing the question presented but to rebutting an argument it acknowledges Petitioner is not making. The government argues at length against a free-standing procedural rule under which a vocational expert would always have to produce upon request the data underlying her testimony in order for a court to affirm an ALJ's benefits determination under substantial evidence review. *See id.* at 26–40.

This Court need not address the merits of this rule because Petitioner is not advocating for it. When the only information in the record regarding dynamic job markets is the conclusions of an expert coupled with the expert's refusal to produce the data underlying those

conclusions, the substantial evidence standard is not met. But that is not a "procedural" rule, requiring in every case the provision of a "document-on-demand." *Id.* at 31. Rather, it is a substantive judgment concerning the quality and quantity of evidence in the agency record. The Seventh Circuit has never held—and Petitioner has never argued—that if a record contains both the unsupported testimony of the expert *and* independent evidence substantiating the expert's testimony, an applicant could still make a free-standing procedural due process objection because the expert failed to provide the data upon which she relied. *That* would be a procedural rule, providing an avenue for relief independent of the record before the agency. As the government acknowledges, Petitioner does not ask the Court to adopt such a rule. *Id.* at 35

Finally, the government's administrability arguments ring hollow. *See id.* at 52–54. In opposing certiorari the government cited the SSA's *Vocational Expert Handbook*[1] which, it claimed, would render this case of "limited prospective importance" because the *Handbook* already instructed vocational experts to "have available, at the hearing, any vocational resource materials [on which they] are likely to rely." BIO 18 (quoting *Handbook* at 18) (alteration in original). In its merits brief, the government fails to even cite the *Handbook* and now claims its policies would be "impractical and unduly burdensome." Gov't Br. 52. Yet social security applications are not processed any slower

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[1] SSA, *Vocational Expert Handbook* (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf

in the Seventh Circuit than nationwide, *see* NOSSCR Amicus Br. 13 n.27, and the facts as they have existed in that circuit since 2002 undercut the government's workability arguments.

Stripped of its newfound administrability concern, the government's brief fails to address the underlying problem presented by its position: The only way an expert could testify that 1,500 sorter jobs existed in Southeast Michigan between October 2009 and May 2013—and that this number would erode between 20 and 30 percent when the jobs are limited to a below-sedentary exertion level—is for the expert to conduct a data-driven job market survey. If this survey already exists, the government provides little justification for why it should not be produced upon demand. If the survey does not exist, then how can an expert reliably opine on the specific number of sorter jobs that existed between 2009 and 2013 in Southeast Michigan? The government provides no answer.

ARGUMENT

I. THE TESTIMONY OF A VOCATIONAL EXPERT CANNOT CONSTITUTE SUBSTANTIAL EVIDENCE OF OTHER WORK WHEN THE EXPERT REFUSES TO PROVIDE THE DATA UPON WHICH HER TESTIMONY IS BASED.

A. Substantial Evidence Demands More Than Bottom-Line Conclusions For Which The Expert Refuses To Provide Support.

The Seventh Circuit's rule rests on the bedrock principle that "[e]vidence is not 'substantial' if vital testimony has been conjured out of whole cloth." *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002). Thus, "an expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand." *Id.* If an expert refuses to provide the data, the expert's testimony is not stricken from the record. Rather, without the underlying data, a court cannot find substantial evidence that "a significant number of jobs were available to [the applicant]" based on the unsupported testimony alone. *McKinnie v. Barnhart*, 368 F.3d 907, 911 (7th Cir. 2004).

The Seventh Circuit's rule vindicates this Court's instruction that substantial evidence requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938); *see* Pet. Br. 21–30. An expert who provides specific, data-driven

testimony, but then refuses to provide to the applicant and the agency the very data she acknowledges form the basis for her testimony, has failed to provide "evidence having rational probative force" as this Court requires. *Consol. Edison*, 305 U.S. at 230.

The government does not cite a single decision of this Court in which an expert witness's unsubstantiated claims about data have been deemed "substantial evidence," let alone when the expert identified but then refused to provide the data underlying her claims. The government claims *Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453 (1972), supports its position. Gov't Br. 39–40. Not so. *Florida Power & Light* was the exceptional case in which expert testimony concerning facts regarding the "elusive nature of electrons" for which "experimental evidence . . . [is] practically unobtainable" could, alone, constitute substantial evidence. 404 U.S. at 466–67. Surveys regarding the number of bench assembler jobs in Southeast Michigan between 2009 and 2013—that the vocational expert claimed to possess and rely upon—bear no resemblance to complex physics experiments that, "if they are feasible at all[,] would take one to two years to conduct." *Id.* at 467–68 (footnote omitted).

A simple example demonstrates the incongruence of the government's position. If a vocational expert testified that there existed 1,500 sorter positions in Southeast Michigan and, when asked for the basis of this testimony, responded, "I have a source, but I just don't feel like identifying it or sharing it with you," surely the government would not claim the expert's testimony alone could constitute substantial evidence upon which

an ALJ could base a benefits determination. Regardless of the witness's tenure as a vocational expert, the blanket refusal to provide any numerical basis for the testimony undercuts the testimony's reliability and probative value. In much the same way, while a police officer's general experience might aid him in determining whether probable cause exists that a crime has been committed, *see Ornelas v. United States*, 517 U.S. 690, 700 (1996), no court would accept an officer's testimony that a suspect had a 0.08% blood alcohol concentration absent an officer conducting a breathalyzer examination and providing the court with test results evidencing that conclusion. These hypotheticals demonstrate a basic proposition: when an expert testifies regarding the results of a data-driven analysis and is questioned regarding that analysis, a court or agency cannot reasonably rely on the testimony absent provision of the analysis or data itself.

B. The Government Provides No Persuasive Justification For Why The Testimony Of A Vocational Expert Constitutes Substantial Evidence, When The Expert Refuses To Provide Her Underlying Data.

The government does not even attempt to justify the expert's purported confidentiality rationale for refusing to provide her data, nor does the government explain why the myriad means of protecting sensitive information, used in agency proceedings and federal courts every day, would not have been a viable option here. *See* Pet. Br. at 53–54. Rather, the government identifies three reasons why the substantial evidence

standard is met when a vocational expert testifies regarding the specific number of jobs available to an applicant but then refuses to provide the data upon which that testimony is based. None is persuasive.

First, the government argues "[v]ocational experts are practitioners with expertise" and this "expertise and impartiality" makes their testimony "presumptively reliable." Gov't Br. 44. The length of an individual's tenure as a vocational expert, however, says nothing about her success in a particular case at marshaling accurate data sources and correctly applying a valid methodology to calculate the number of available jobs based on various hypotheticals posed by an ALJ. *See* Pet. Br. 49–52. The government claims the agency's "own role as 'an adjudicator and not as an advocate or adversary' further contributes to the 'reliability and impartiality' in their expert opinions." Gov't Br. 45 (quoting *Richardson v. Perales*, 402 U.S. 389, 403 (1971)). But the government never explains why the agency's neutrality means that an expert witness has used accurate data sources and correctly applied a valid methodology. *See* Pet. Br. 49–52.

Moreover, the government's presumption of reliability is especially misplaced here. Criticism of the "reliability of a vocational expert's job numbers, or the evidentiary basis for those numbers" is "familiar and recurring" in the federal courts. *Shaibi v. Berryhill*, 883 F.3d 1102, 1108 (9th Cir. 2017). Then-Judge Posner, in particular, frequently criticized ALJs for relying on "arbitrary estimate[s]" provided by vocational experts, *Herrmann v. Colvin*, 772 F.3d 1110, 1114 (7th Cir. 2014), and experts' "preposterous" methodology resulting in

job estimates "likely . . . to be a fabrication," *Alaura v. Colvin*, 797 F.3d 503, 508 (7th Cir. 2015). *See* NADR Amicus Br. 8 (collecting cases). As the NOSSCR brief demonstrates, the job numbers vocational experts provide when testifying about the exact same category of jobs designated by a representative DOT code vary substantially: from 16,000 to 471,000 jobs for DOT 521.687-086 (O'Callaghan opined 120,000 jobs, Pet. App. 116a) and from 4,800 to 280,160 for DOT 713.687-018 (O'Callaghan opined 240,000, Pet. App. 116a). *See* NOSSCR Amicus Br. 6–8. These considerable ranges demonstrate the subjectivity and imprecision in vocational expert testimony, and the importance of hard data to validate that testimony before an agency can rely upon it.

Second, the government notes that applicants have the opportunity to cross-examine vocational experts and that through this mechanism "[t]he 'reliability' of testimonial evidence is properly tested." Gov't Br. 46. The government posits "[a] vocational expert, for instance, might persuasively answer a claimant's questions on cross-examination about the methodology she employed and might identify the specific publicly available data that she used to create any particular written analysis that may actually have formed the basis for her testimony." *Id* at 31; *see also id.* at 47 (noting claimants can cross-examine experts on "public jobs data that vocational experts utilize").

Petitioner agrees that as a general matter, and when the necessary materials have been provided to a questioner, cross-examination is a critical means of probing a witness's testimony. But the government's

hypotheticals differ from this case in a core respect: the vocational expert here did not rely solely on *publicly available* data, but instead relied on private "individual labor market surveys" that she withheld from Petitioner. Pet. App. 118a–119a. Contrary to the government's claim, Gov't Br. 48, Petitioner did ask the expert from where she obtained her job numbers and her "20 to 30 percent" further reduction of those numbers, Pet. App. 117a. He also requested the "individual labor market surveys" the expert identified. *Id.* at 119a.

In arguing that Petitioner never "asked about the nature of the individual labor market surveys" or "what methodology and sources of data the expert used in doing those analyses," the government apparently recognizes the importance of that very information in assessing the quality of the expert's conclusions. Gov't Br. 48, 50. The government nevertheless fails to explain how cross-examination on these points could be effective or probative absent the underlying data. Even leaving aside the inefficiency inherent in a witness describing data sets and statistical surveys rather than simply producing them, an applicant lacks any means of verifying the validity of the expert's responses. Thus, while the government concedes the relevance of the "specific categories of information any written analyses might contain," *id.* at 48, it never explains why the expert's self-serving description of that information is an acceptable substitute for the provision of the information itself.

Third, the government argues that applicants have the option to "submit rebuttal evidence, including an

opinion from a different vocational expert." *Id.* at 51. This argument ignores the agency's burden of demonstrating a sufficient number of available jobs under step five. The government never demonstrates how conclusory and unsupported testimony, combined with *rebuttal* evidence to the contrary, could somehow sustain the agency's burden. Moreover, in this particular case, Petitioner's expert "did not respond to O'Callaghan's . . . estimated job numbers for [] the bench assembler and sorter positions." *Id.* at 16. Thus, the *only* job numbers in the record were those of the agency's expert which, for the reasons Petitioner has previously discussed, did not constitute substantial evidence.

The government's resort to rebuttal experts is also irreconcilable with the "self-evident" need for "efficiency" in social security proceedings. *Barnhart v. Thomas*, 540 U.S. 20, 29 (2003) (quotation marks omitted). A battle of the experts is the opposite of the efficient and streamlined process Congress designed and this Court has enforced. A rule that in effect requires twice as many witnesses to hold the government to its burden of demonstrating other work available to an applicant is neither legally justified nor practically desirable.

II. THE SEVENTH CIRCUIT'S REJECTION OF UNSUPPORTED VOCATIONAL EXPERT TESTIMONY ENFORCES THE SUBSTANTIAL EVIDENCE STANDARD; IT DOES NOT IMPOSE A PROCEDURAL RULE.

The government acknowledges that Petitioner is not making a procedural due process argument, *see* Gov't Br. 35, and, likewise, recognizes that the court of appeals never addressed such a claim, *id.* at 43. The government nonetheless spends most of its brief rebutting precisely the procedural argument it recognizes is not in this case. Claiming "the premise for [Petitioner's] position is ultimately a procedural one," *id.* at 42, the government asserts that substantial evidence review "is not the means by which a party may challenge agency decisions affecting what evidence may or must be obtained by a party or admitted into the administrative record," *id.* at 28–29. To rule otherwise, the government claims, would introduce a "doctrinal innovation . . . particularly unwarranted here." *Id.* at 36.

The government is responding to an argument Petitioner has never made. The government misunderstands the basic distinction between a procedural rule that provides a basis for relief in every case a procedure is not followed, and a substantive rule that assesses the quality and quantity of evidence in an agency record. Moreover, as this Court's decisions demonstrate, the fact that alternate procedures might cure deficiencies in an agency record does not transform the substantial evidence standard into a rule of procedural due process.

A. Rejecting The Agency's Reliance On A Vocational Expert's Unsupported Testimony Vindicates A Substantive Standard, Not A Procedural Requirement.

As this Court has emphasized, "[t]he categories of substance and procedure are distinct." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). There exists a basic distinction between procedural rules that govern the means through which an evidentiary record is created, and substantive evidentiary standards through which the content of a record is assessed. The basic requirement of procedural due process is "the right to notice and an opportunity to be heard." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). And because a constitutionally mandated procedural right exists by definition in every case, the basis for a procedural due process challenge does not depend on the substantive evidence upon which an underlying decision rests. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 4 (1991) (finding state statute that authorized prejudgment attachment of real estate without prior notice or hearing or other procedural protections violated procedural due process); *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972) (identifying "minimum requirements" of procedural due process required during parole revocation hearings); *see also Nelson v. Colorado*, 137 S. Ct. 1249, 1257–58 (2017); *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).[2]

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[2] The same distinction between a substantive challenge and a procedural due process claim exists in cases brought by social

As the government acknowledges, Petitioner is not making a procedural due process argument, and the foregoing examples demonstrate why. If the only evidence in the record regarding the other work available to an applicant is the testimony of a vocational expert who refuses to provide the private data that form the basis for her testimony, the substantial evidence standard is not met. But the agency might be able meet its burden of supplying substantial evidence of other work available to an applicant—even if its expert refuses to produce her underlying data on demand—by introducing other evidence into the record. Thus, in Petitioner's case, had the agency also introduced independent evidence regarding the number of jobs available in Southeast Michigan between 2009 and 2013—whether through surveys and analyses or a different expert who was able to produce her underlying data—a reviewing court could have found substantial evidence supporting the ALJ's finding of other work. Petitioner has never argued that the vocational expert's refusal to provide her underlying data creates a stand-alone procedural objection, rooted in the Constitution, to the denial of benefits in his and every other case regardless of any other evidence in the record. And the Seventh Circuit has never recognized such a free-standing right either.

The government is thus wrong in claiming Petitioner has adopted a "document-on-demand theory of the substantial-evidence test." Gov't Br. 31. If a vocational expert "identif[ies] the specific *publicly available* data

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security applicants in this Court. *See, e.g., Heckler v. Campbell*, 461 U.S. 458, 468–69 (1983).

that she used to create any particular written analysis that may actually have formed the basis for her testimony," *id.* (emphasis added), both an applicant and the ALJ can access that data source to probe and confirm the reliability of the expert's testimony. But that is an entirely different substantive record from one in which the data source upon which the expert relies is secret, is in the expert's possession alone, and can never be reviewed by the ALJ or the applicant.

The government's principal response is to focus *not* on the facts as presented by this case, but on an alternate, hypothetical, scenario. The Seventh Circuit has held that if an applicant "d[oes] not question the basis for the vocational expert's testimony, purely conclusory though that testimony [is]" during the hearing before the ALJ, the applicant "forfeit[s]" a subsequent challenge to the expert's job estimates. *Barrett v. Barnhart*, 355 F.3d 1065, 1067 (7th Cir. 2004). The government claims that when "a claimant in SSA proceedings stays silent" and does not request the data upon which the expert's conclusions are based, "the state of the evidentiary record will be exactly the same" as when the data is requested and the expert refuses to produce it. Gov't Br. at 31. Thus, because it believes the substance of the record is "exactly the same" in both cases, the government claims the Seventh Circuit's rule must be a procedural one. The government's reasoning is wrong for three reasons.

First, the government's argument rests on the premise that there is no difference between a record when an expert is asked for the basis of unsupported conclusions and withholds that information, as compared

with when an expert is not asked for the basis of her testimony at all. But this Court has long recognized that when a party claims that evidence buttresses the testimony provided, but refuses to present that evidence for examination, both the testimony and facts that would be proved by the missing evidence are cast into doubt. *See Clifton v. United States*, 45 U.S. (4 How.) 242, 247–48 (1846) (a party's presentation of less reliable evidence at trial, notwithstanding the party's "possession or power" over "greater" proof, suggests "if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal"); *see also Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."); *Hanson v. Eustace's Lessee*, 43 U.S. (2 How.) 653, 708 (1844).[8]

This principle applies with full force here. The expert *identified* her "private labor market surveys" as supporting her testimony and then refused to provide them even in a redacted form. By relying on the testimony of the expert, while not even attempting to justify her claim that confidentiality precluded the disclosure of her data, the government attempts to satisfy its evidentiary burden through testimony

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[8] This principle applies no less in the context of judicial review of administrative decisions. *See Ala. Power Co. v. Fed. Power Comm'n*, 511 F.2d 383, 391 n.14 (D.C. Cir. 1974) ("[A] party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse inference from failure to do so."); *see also Saylor v. U.S. Dep't of Agric.*, 723 F.2d 581, 583 (7th Cir. 1983).

without demonstrating that the testimony has "a basis in evidence having rational probative force," *Consol. Edison*, 305 U.S. at 230.

Second, both the Seventh and Ninth Circuits have held that "when a claimant fails entirely to challenge a vocational expert's numbers during administrative proceedings before the agency, the claimant forfeits such a challenge on appeal, at least when that claimant is represented by counsel." *Shaibi*, 883 F.3d at 1109; *see also Barrett*, 355 F.3d at 1067. Whether characterized as forfeiture of an objection, acquiescence in testimony's reliability, or a refusal to allow applicants to raise belatedly a challenge that could have been resolved during the hearing itself, these cases reflect the normal rule that "courts should not topple over administrative decisions unless the administrative body not only has erred, but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

The government itself analogizes the substantial evidence standard to the standard for summary judgment in civil litigation. *See* Gov't Br. 25. That standard specifically distinguishes between situations where material facts are challenged by an opposing party—rendering summary judgment improper—and situations where material facts are undisputed. *See, e.g.*, *Beard v. Banks*, 548 U.S. 521, 527 (2006). The summary judgment standard only reinforces the distinction between a record in which an applicant challenges the basis for a vocational expert's conclusions on an issue for which the agency bears the burden of proof, and a record in which an applicant does not.

Third, the rule that a vocational expert's testimony alone can constitute substantial evidence if unchallenged, but not if challenged, is entirely consistent with the agency's own policies. In a policy interpretation ruling, the agency provided that before relying on a vocational expert's testimony, an ALJ must "[i]dentify and obtain a reasonable explanation for any conflicts between occupational evidence . . . and information in the Dictionary of Occupational Titles." SSR 00-4P, 2000 WL 1898704, at *1 (Dec. 4, 2000) (emphasis added); *See* Pet. Br. 54–55. This policy reflects the reality of the ALJ's role: "Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims v. Apfel*, 530 U.S. 103, 110–11 (2000). The government never explains why it has embraced that rule as a matter of policy since 2004 while rejecting it as a matter of law now.

B. This Court Has Long Recognized That The Content Of An Agency's Record Can Be Assessed While Considering The "Procedures" Used To Compile That Record.

As discussed above, Petitioner is not arguing for a free-standing "document-on-demand" rule, Gov't Br. 23, and thus this Court need not determine whether such a rule would transform "a procedural requirement . . . into a touchstone of substantial evidence, regardless of the state of the record." *Id.* at 32–33. But in arguing that the substantial evidence test is "distinct from the procedures for assembling and designating" *id.* at 43, the

record upon which an agency bases its decision, the government ignores this Court's repeated acknowledgment that the mechanisms through which an agency record is created can, and do, impact the content of the record. This recognition does not turn substantial evidence challenges into procedural due process claims.

The government's error in this regard is most clearly seen in its misreading of *Richardson v. Perales*, 402 U.S. 389 (1971). The government claims that beyond briefly "not[ing] the statutory 'substantial evidence' standard" in *Perales*, the "question" this Court "was called upon to answer was 'what procedural due process requires with respect to examining physicians' reports in a social security disability claim hearing.'" Gov't Br. 34 (quoting *Perales*, 402 U.S. at 402). Thus, the government posits, *Perales* says effectively nothing about the extent to which the procedures an agency uses during a hearing can enhance or detract from the substantiality of the evidence supporting the agency's decision.

This characterization is starkly at odds with the *actual* question presented to the Court, by the government as petitioner, in *Perales*: "Whether written reports by physicians of medical examinations they have conducted may constitute substantial evidence to support a finding of non-disability under the Social Security Act, even though oral medical testimony is contrary to the reports and the claimant has objected to the introduction into evidence of the written reports." Pet. Br. at 2, *Richardson v. Perales*, 402 U.S. 389 (1971), 1970 WL 136651. In arguing that the reports and other evidence could constitute substantial evidence, the government discussed the substance of the reports—

including their "probative value" and "reliability," *id.* at 19—at length, *see id.* at 18–28. The government mentioned "due process"—which it now claims was *the* issue *Perales* decided—just once in passing in its opening brief. *See id.* at 16.

Unsurprisingly, given the question presented and the arguments made by the government, *Perales* identified the applicable legal standard—substantial evidence—in Part IV of its opinion, and then applied that standard to the facts of the case in Part V. In so doing, the Court explicitly held in Part V that the written report of the examining physician "may constitute *substantial evidence* supportive of a finding by the hearing examiner adverse to the claimant," and—tracking the substantial evidence argument made by the government—went on to identify various factors that demonstrated the "underlying reliability and probative value" of the expert's testimony. 402 U.S. at 402. The government's claim that *Perales* "rests on procedural due-process grounds, not the sufficiency of the evidence," Gov't Br. 32, is belied not only by the text of this Court's holding, but by the arguments the government made to the Court. "*Perales* addressed not a procedural question of Social Security law but a substantive one: whether reports of examining physicians, despite being hearsay, could constitute substantial evidence supporting an ALJ's disability determination." *Barrett v. Berryhill*, 906 F.3d 340, 342 (5th Cir. 2018).

To be sure, in explaining why the expert's testimony could constitute substantial evidence, the Court addressed the "integrity and fundamental fairness" of

the procedures through which that testimony was developed. *Perales*, 402 U.S. at 410. Thus, the Court noted the medical reports were based upon "personal consultation and personal examination and rested on accepted medical procedure." *Id.* at 403. Likewise, there was "no inconsistency whatsoever" between the reports of the five specialists. *Id.* at 404. And, in contrast with the facts here, the applicant "did not take advantage of the opportunity . . . to request subpoenas for the physicians." *Id.* But discussing the evidence before the ALJ and the procedures through which it was adduced did not transform the Court's analysis of the substantial evidence supporting the ALJ's finding into an entirely distinct ruling on procedural due process. Rather, *Perales* simply demonstrates the reality that the procedures through which a record is compiled are inextricably linked to the substance of the record that results.

The other cases upon which Petitioner relies likewise demonstrate that the "procedures" through which an agency record is compiled are not "legally distinct" from the substance of that record on substantial evidence review. For example, in *Baltimore & Ohio Railroad Co. v. Aberdeen & Rockfish Railroad Co.*, 393 U.S. 87, 91–92 (1968), the Court determined there was "substantial evidence" in the record of the costs attributable to Northern rail lines for the purposes of revenue allocation. The Court explicitly refused to "sanction" the "lax procedure" of simply accepting the blended Northern rail lines' costs, a procedure it found could lead to "discrimination in favor of the North against the South." *Id.* at 92. In highlighting the deficient

procedure that led to a substantively deficient agency record, the Court was *not* addressing a standalone procedural challenge, but rather was acknowledging the reality that the "procedures" through which a record is formed inevitably impact the substantive record created.

NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939), is in accord. In *Columbian Enameling*, the Court found the Board had erroneously concluded that an employer failed to bargain collectively with its employees, in the absence of substantial evidence that the employer "was aware that the Union desired or sought to bargain collectively." *Id.* at 300. In reaching this conclusion, the Court explicitly noted that the deficiency in the record was "pointedly brought to the attention of the Board . . . and no attempt was made to supply the omission." *Id.* at 298. The fact that this Court identified a "procedure"—calling the witnesses to testify—that could have filled the omission in the record did not change the employer's substantial evidence challenge into a procedural due process claim.[4]

Characterizing the provision of the vocational expert's underlying data here as a "procedure" in no way

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[4] In noting that "[b]ecause petitioner was represented by counsel, this case does not present any question whether an ALJ has an independent duty to probe the testimony of a vocational expert when a claimant is unrepresented," Gov't Br. 47 n.8, the government appears to recognize that the substantiality of record evidence is not entirely divorced from the procedures through which a record was constructed. Otherwise, the question of what an ALJ must do for there to be substantial evidence in the record should not hinge on whether the claimant is represented.

diminishes the fact that failing to provide the data detracts from the substantiality of the evidence in the record.

III. THE SEVENTH CIRCUIT'S RULE IS PRACTICAL AND EFFICIENT.

The government concludes by arguing that the rule adopted in the Seventh Circuit is "impractical and burdensome." Gov't Br. 52. That claim is belied by the government's own arguments during the certiorari stage and actual experience in the Seventh Circuit.

First, the government's practicality concerns are surprising given that in its brief in opposition to certiorari the government claimed Petitioner's rule was "not necessary" because the agency already followed it. The government cited to the SSA's 2017 *Vocational Expert Handbook*, which provided that experts "should have available, at the hearing, any vocational resource materials [on which they] are likely to rely"; and "[i]n some cases, the ALJ may ask [them] to provide relevant portions of materials [they] rely upon." BIO 18 (quoting *Handbook* at 37) (alterations in original). The government never explains why it has reversed positions—previously arguing that vocational experts *already* are advised to have available at hearings the materials upon which they rely, yet now arguing that this requirement would be burdensome and impractical. Indeed, the government does not even acknowledge the SSA's *Vocational Expert Handbook* once in its brief.

Second, the government notes that "a vocational expert does not know in advance what hypothetical

questions an ALJ will pose" and thus "would be unlikely to be able to have available for the hearing all potentially relevant documents." Gov't Br. 52. Not only is this statement at odds with the SSA's own requirements as discussed in the *Handbook*, but it ignores the reality of vocational expert testimony. Even if an expert does not know in advance what an ALJ might ask, if asked about a specific number of jobs available for an applicant with a defined set of limitations, the expert *must* have a data-driven basis to answer. If so, the data is by definition available. If the expert is surprised by a question and has no data-driven answer at her fingertips, then the correct response is for the expert to explain that she cannot answer the question, *not* for the expert to provide an answer for which she has no factual basis. The latter cannot possibly be substantial evidence.

Third, the government represents that it has been informed by the SSA that the agency has not issued an acquiescence ruling. *See* Gov't Br. 53. Regardless of the agency's position, district courts within the Seventh Circuit reverse and remand benefits denials when vocational experts refuse upon demand to provide the data that form the basis for the "other work" numbers. *See* Pet. Br. 40 (citing cases). Indeed, the government recognizes that the Seventh Circuit *requires* "the data underlying a VE's testimony ... be available on demand," *Britton v. Astrue*, 521 F.3d 799, 804 (7th Cir. 2008), and thus parties within the Seventh Circuit "cooperate" to "allow information underlying an expert's testimony to be considered," Gov't Br. 54 (quotation marks omitted). Notwithstanding this requirement, processing times for benefits applicants within the

Seventh Circuit fall well within the national average, and indeed seven hearing offices within the Seventh Circuit are in the top half of offices nationwide in processing time. *See* NOSSCR Amicus Br. 13 n.27. The Seventh Circuit's rule has thus advanced, rather than impeded, the objectives of the SSA system.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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